Supreme Court, U. S.
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NO. 80-50

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SAM MILLER McDONALD
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether Petitioner was denied a fair trial and due process of law by the trial court's action, after conclusion of the trial, in questioning the jurors individually in an attempt to ascertain whether Petitioner was harmed when the trial court allowed the jury to separate after the charge had been delivered.

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THE STATE OF TEXAS,

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on March 19, 1980. *McDonald v. State,* ____ S.W.2d ____ (No. 58,823). The opinion is reproduced as Appendix A to the Petition.

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claims are based on the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement of the case. However, Respondent cannot agree with Petitioner's statement that all initial questions at the post-trial hearing propounded by the trial judge were posed with an eye towards showing that no harm resulted from the separation of the jury. Respondent would further point out that Petitioner failed to object when the trial judge informed the first two juror-witnesses that they could be held in contempt of court if their testimony revealed that improper discussion of the case was had during the separation.

Respondent also wishes to advise this Court that on May 21, 1980, Petitioner filed an application for writ of habeas corpus in the United States District Court for the Eastern District of Texas, Paris Division. *McDonald v. Estelle*, Civil Action No. P-80-18-CA. A copy of that petition is attached to this Brief as Appendix A.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the issues presented.

This Court should refrain from acting on the Petition for Writ of Certiorari pending disposition of Petitioner's application for writ of habeas corpus in the United States District Court.

Petitioner has not presented the precise issue raised herein to the Texas Court of Criminal Appeals, and therefore this Court is without jurisdiction to grant the writ of certiorari.

The post-trial hearing of which Petitioner complains did not deny him due process of law or his right to a fair trial, and he was in no way harmed thereby.

ARGUMENT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exists.

II.

THIS COURT SHOULD REFRAIN FROM ACTING ON THE PETITION FOR WRIT OF CERTIORARI IN ORDER TO ALLOW PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT TO PROCEED IN AN ORDERLY FASHION.

Petitioner's application for writ of habeas corpus was filed in the United States District Court for the Eastern District of Texas, Paris Division, on May 21, 1980. The Petition for Writ of Certiorari was filed in this Court on June 19, 1980. Under the statutes governing applications for federal writ of habeas corpus, this Court may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. 28 U.S.C. §2241(b). It is therefore proper, Respondent submits, for this Court to refrain from acting on the Petition pending the orderly disposition of the application for writ of habeas corpus in the federal district court.

III.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIM BECAUSE IT WAS NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner contends that he was denied a fair trial and due process of law by the court's conduct of a post-trial hearing to determine whether Petitioner had been harmed by the separation of the jury without his consent. This contention was not presented to the Texas Court of Criminal Appeals in Petitioner's appeal of his conviction. The grounds of error asserted by Petitioner in his appellate brief relevant to the separation of the

jury and the post-trial hearing are reproduced as Appendix E to the Petition. Petitioner complained that the post-trial hearing constituted reversible error, but did not allege that this procedure deprived him of a fair trial or denied him due process of law.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana, supra*, at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

Respondent submits that in view of Petitioner's failure to raise the issue presented here below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to address the issue, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to Petitioner, the application for certiorari should be denied for want of jurisdiction. *Cardinale v. Louisiana, supra*, at 439.

IV.

PETITIONER WAS NOT DENIED HIS RIGHT TO A FAIR TRIAL OR DUE PROCESS OF LAW BY THE PROCEDURE EMPLOYED BY THE TRIAL COURT.

Petitioner's contention that he was denied a fair trial and due process of law by the trial court's conduct of the post-trial hearing fails to raise a constitutional claim worthy of this Court's consideration. The opinion of the Texas Court of Criminal Appeals, which is reproduced as Appendix A to the Petition, fully discussed this contention and found it to be without merit.

Even though the separation of the jury was without Petitioner's consent, and therefore in violation of Article 35.23 of the Texas Code of Criminal Procedure, Petitioner was not harmed thereby. Neither was Petitioner harmed by the post-trial hearing of which he complains. As stated by the Court of Criminal Appeals and conceded by Petitioner, there is no specific statutory procedure for the State to meet its burden of showing that Petitioner was not harmed by the separation of the jury. Even if the hearing had been in violation of Texas procedural rules, which it was not, matters of state procedure are not reviewable in a federal forum absent a denial of fundamental fairness. *Forbes v. Estelle*, 559 F.2d 967 (5th Cir. 1977); *Nichols v. Estelle*, 556 F.2d 1330 (5th Cir. 1977); *Willeford v. Estelle*, 538 F.2d 1194 (5th Cir. 1976).

Neither the holding of the post-trial hearing nor the manner in which it was conducted caused Petitioner to suffer the deprivation of any constitutionally protected right. The State was entitled to an opportunity to rebut the presumption of harm arising from the separation of the jury without Petitioner's consent, and it is of no consequence that the trial judge conducted the initial questioning of the jurors. The trial court stated prior to the hearing that it would allow both the prosecutor and

defense counsel to question the jurors, and Petitioner's attorney fully availed himself of the opportunity. Examination of the questions propounded by the trial judge belies Petitioner's assertion that they were "posed with an eye toward showing that no harm resulted . . ." (Petition, p. 9). Petitioner's actual complaint appears to be that he was unable to demonstrate that he was prejudiced by the separation of the jury. Petitioner is unable to do so, Respondent submits, for an obvious reason: nothing prejudicial to Petitioner's rights occurred during the jury recess. The authorities cited by Petitioner which disapprove a person serving in the dual role of prosecutor and judge are simply inapplicable to the facts of this case.

Petitioner also complains that the trial judge warned the first three jurors prior to questioning them that they could be held in contempt of court if their testimony revealed any improper discussion of the case. As observed by the Court of Criminal Appeals, appellant failed to object to the first two jurors being so warned, thereby waiving any claim as to them. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court of Criminal Appeals found that under the circumstances, no reversible error was presented. Petitioner has not shown that he was harmed by these questions; to presume harm under these circumstances would be to engage in speculation.

Finally, Petitioner urges that the questions propounded by the trial court prevented defense counsel from interviewing the jurors in regard to possible misconduct. Petitioner has not demonstrated any causal relationship between the post-trial hearing and the reluctance of the jurors to discuss their deliberations, and Respondent submits that none exists. The jurors were entitled not to discuss their deliberations, as stated by the Court of Criminal Appeals, and their exercise of this privilege has not been shown to have harmed Petitioner in any way.

Whether Petitioner was prejudiced by the jurors' unwillingness to discuss their deliberations is a factual issue which does not, by itself, justify the exercise of this Court's certiorari jurisdiction. *Tacon v. Arizona, supra,* at 352; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

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Attorneys for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

SAM MCDONALD,	§	
	§	
Petitioner	§	
	§	
VS.	§	
	§	
W. J. ESTELLE, DIRECTOR OF PRISONS OF THE STATE OF TEXAS, AND, MARK WHITE, ATTORNEY GENERAL OF THE STATE OF TEXAS,	§	No. P-80-18-CA
	§	
Respondents	§	

PETITION FOR WRIT OF HABEAS CORPUS

1. Name and location of court which entered the judgment of conviction under attack is the 6th Judicial District Court of Fannin County, Texas.

2. Date of judgment of conviction is May 6, 1977.

3. Length of sentence is 15 years, without probation.

4. Nature of offense involved is voluntary manslaughter.

5. Plea was not guilty.

6. A jury trial was held.

7. Petitioner testified at the trial.

8. Petitioner appealed from the judgment of conviction.

9. Petitioner appealed to the Court of Criminal

of the State of Texas. The conviction was affirmed by the Court of Criminal Appeals on March 19, 1980, and Application for Re-Hearing was denied on April 30, 1980. Thereafter, the Petitioner filed an Application for Stay of execution of the state court sentence in the Texas Court of Criminal Appeals on May 5, 1980, and that was denied thereby on May 7, 1980. Thereafter, the Petitioner on May 7, 1980, filed a similar Application for Stay in the Supreme court of the United States, and same was denied thereby on May 9, 1980. The Petitioner intends to timely file his Application for Writ of Certiorari in the Supreme Court of the United States.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Answer: Yes.

11. If your answer to 10 was "yes," give the following information:

(a)(1) Name of Court: Texas Court of Criminal Appeals for the State of Texas.

(2) Nature of proceeding: Motion for Rehearing.

(3) Grounds raised: See the attached Exhibit "A."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result: Application denied.

(6) Date of Result: April 28, 1980.

(b)(1) Name of Court: Court of Criminal Appeals for the State of Texas.

(2) Nature of proceeding: Application for Stay.

(3) Grounds raised: that execution of the state court sentence should be stayed pending filing Writ of Certiorari to the Supreme Court of the United States.

See the attached Exhibit "B."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result: Application denied.

(6) Date of result: May 7, 1980.

(c) As to any second petition, application or motion, give the same information:

(1) Name of court: Supreme Court of the United States.

(2) Nature of proceeding: Application for Writ of Stay.

(3) Grounds raised: Same as in the Application to the Texas Court of Criminal Appeals, including the hearing difficulties of the Petitioner would make preparation of the Application for Writ of Certiorari difficult, if not almost impossible. See the attached Exhibit "C."

(4) Did you receive an evidentiary hearing on your petition, application or motion? Answer: No.

(5) Result. Application denied.

(6) Date of result: May 7, 1980.

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion? Answer: Yes. See above.

12. A. **Ground one**: Petitioner was deprived by his conviction of liberty without due process of law, and in violation of equal protection of law.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful

hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or ruling of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

B. **Ground two**: The conviction was obtained in violation of the Petitioner's right to confront the witnesses against him.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could

only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

C. **Ground three**: The conviction was obtained by the Petitioner's failing to receive a fair and impartial trial of his case.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

D. **Ground four**: Because of Petitioner's hearing impairment, and his inability to communicate with counsel during trial, the Petitioner, because of his said physical disability, could not exercise his full right to assistance of counsel for his defense.

Supporting facts: It is uncontroverted, as was so testified to during Petitioner's trial, that the Petitioner suffers from an eighty (80%) per cent to ninety (90%) per cent total hearing loss, even with the use of a powerful hearing aid, being the strongest available to the

Petitioner anywhere. See the attached Exhibit "D." The trial was conducted without any amplification of witnesses', judge's, and/or counsels' voices, nor were there any means provided for the Petitioner to communicate with his counsel during trial. The above-described hearing loss is increased during the times of tension and crisis that the Petitioner is encountering, and the trial of this cause further reduced the hearing capabilities of the Petitioner because of the tension that he had during the trial. Therefore, because of the above, the Petitioner could not hear the voir dire of the jury, the statements, admonishments, and/or rulings of the court, the arguments and/or objections of counsel, and could only hear no more than isolated words testified to by two of the many witnesses presented against him at his trial, motion for new trial, and/or sentencing.

E. **Ground five**: Conviction of the Petitioner on the charge of the Court was a denial of due process, equal protection of the laws and his right to a fair and impartial trial. In addition, or in the alternative, the refusal of the trial court to submit Petitioner's requested issues and the ultimate conviction of Petitioner was a denial of due process and his right to a fair and impartial trial. In the alternative, the laws of the State of Texas, with regard to defense of a habitation, and the resulting convictions of Petitioner thereunder was a denial of due process and equal protection of the law, and his right to a fair and impartial trial.

Supporting facts: The Petitioner, at the time being 52 years of age, the father of five children, weight 145 lbs., with approximately eighty to ninety per cent hearing loss, and with restricted use of his right leg, a metal plate between his hip and knee holding the leg bones together, which he had been wearing for a number of years, on the date alleged in the indictment lived at 902 Lynn Street, Bonham, Fannin County, Texas, with his wife and two minor daughters. The deceased, R.N. Hartline, was 39 years of age and was a well-developed man of six feet, or just over, and weighed

170 to 180 lbs. On December 12, 1976, a Sunday, about 3:30 p.m., when Petitioner was in the kitchen of his home working on some papers, his wife told him someone wanted to see him at the front door. Petitioner went outside the front door and saw a man, whom he did not recognize, and who identified himself as R.N. Hartline. Hartline wanted Petitioner to sign a release of a Deed of Trust lien on property previously sold by the Petitioner and his wife in 1972 to the said R.N. Hartline and wife. Petitioner, after looking at it, told Hartline that he, the Petitioner, would want to check with his attorney regarding it. Hartline told Petitioner, "I want the paper signed, and I want to take it back with me." Petitioner left Hartline in the front yard and went into his house, tried to call his attorney, failed to reach him, and returned to the outside of his house where Hartline was still waiting. Petitioner told Hartline that he was unable to reach his attorney, and that if Hartline would leave the paper with Petitioner until Friday of that week, Petitioner would contact his attorney and get him to look it over. Hartline insisted that he wanted the paper signed, and was going to take it back with him that day. Petitioner told Hartline that he would not sign the paer until he sought legal advice. Petitioner turned to go into his house. He went through the garage door and, Hartline, without any invitation from Petitioner, followed Petitioner into his kitchen, and to the surprise of Petitioner, said to Petitioner, "You are going to sign that paper or wish you had," and at that time he had a butcher knife in his hand which Hartline had picked up from the counter of Petitioner's kitchen in his home and was coming toward Petitioner. Petitioner backed up against the wall of his kitchen, and reached into the utility pantry in the kitchen with his right hand and retrieved a gun, which he raised and fired, at a time when he was in fear for his life, was acting in self-defense, and Hartline had in his hand a deadly weapon, and was coming toward the Petitioner. Attached hereto as Exhibit "E" are portions of records of said trial proceedings, being pages 460 and 461, which are

incorporated herein for all purposes.

F. **Ground six.** Conviction was obtained in violation of Petitioner's rights to equal protection and due process of law because of the actions of the trial court and the resulting effect thereof upon the jury.

Supporting facts: After the charge on guilt-innocence phase of the trial had been read to the jury, and after the County Attorney for the State and Buster Cole for the Petitioner had made their opening arguments to the jury, the Trial Court announced to the jury that before continuing with final arguments, he was going to give them a brief recess so that if they desired to call home and notify anybody at home that they might be late getting home, they could do so, and that they might use the phone in the District Clerk's office at the end of the hall and return to the Courtroom in five minutes, all of which was without the consent of the Petitioner, and the Court, on its own motion, separated the jury.

The Record shows that the separation of the jury took place on the second floor of the courthouse in Bonham, and outside the courtroom. That the length of time the jurors were out of the courtroom varied from five minutes to about thirty minutes, and that the number of people standing around in the hall varied from a few to as many as fifty, including relatives and friends of the deceased, and that the jurors went into the various offices, including the County Attorney's office and the Justice of the Peace office during the recess.

Petitioner moved the court for a mistrial upon the ground that the Court permitted the jury to leave the courtroom without being accompanied by a bailiff and to go unescorted in violation of the Code of Criminal Procedure, which motion was by the Trial Court overruled, and Petitioner excepted.

Immediately after the jury had returned its verdict

assessing the punishment in this case, the Trial Court instructed the jury to go back to the jury room, and stated to counsel that on the Court's own motion he would "conduct an inquiry into the conduct of the jury during the five minute recess taken yesterday afternoon during final arguments on guilt or innocence."

The Trial Court undertook to and did question each juror separately, and in questioning at least two of the jurors, admonished them that if they had violated the Court's instructions the juror could be held in contempt of court and punished therefor. The effect of the trial court's action in this regard could only amount to harm and injury to the Petitioner in violation of his constitutional rights.

This conduct and action of the Trial Court was objected to by the Petitioner, for the reason that there was no provision in the law for the Court's so doing, that Petitioner was thereby denied an opportunity to make his own investigation, and upon the further ground that such action on the part of the Trial Court was injurious to the rights of the Petitioner, such inquiry was without authority in law, and once the jury had rendered its verdict, it was no longer under the control of the Trial Court but by law was discharged.

Further, that the action of the Trial Court in calling the jurors to testify separately and placing them under oath and questioning them, with admonition by the Trial court to one or more of the jurors, that such juror could refuse to answer the question propounded by the Trial Court on the ground that his or her answers might incriminate such juror and telling the juror that he or she might be held in contempt of court, placed such jurors, and each of them, in such a frame of mind as to be reluctant, hesitant, and fearful of talking to Petitioner's counsel, and rendered the hearing on the Petitioner's Amended Motion for New Trial a useless and futile effort of Petitioner to correct the errors of the trial court. Particularly, was this result effected, when, in the

presence of a juror under such inquiry, the District Attorney was asked by the Court if he granted immunity to the juror, he replied, "I do not...." Attached hereto as Exhibit "F" are portions of the record of the trial proceedings, being page 527-528, 533-534, 540, 572, and 625-643, which are incorporated herein for all purposes.

13. If any of the grounds listed in 12A, B, C, D, E, and F, were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

As to Grounds 12A, B, C, and D, these were not presented, except as a ground in the Motions for Stay, above-described.

Petitioner does not know why these were not previously presented, but they were first mentioned to Petitioner by his present attorney, Mr. Hefner, on or about May 5, 1980, which was shortly after Mr. Hefner became involved in Petitioner's case.

The grounds raised in 12E and F, were raised on the direct appeals, above-described.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No, but Petitioner anticipates timely filing his Writ of Certiorari, above-described.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing, arraignment and plea, trial, sentencing, appeal to the Texas Court of Criminal Appeals, and Application for Rehearing before the Texas Court of Criminal Appeals:

Mr. G. C. Harris
Attorney at Law
2403 Stonewall Street
Greenville, Texas 75401

and

Mr. Buster Cole
Attorney at Law
310 North Center Street
Bonham, Texas 75418

(b) Application for Stay before Texas Court of Criminal Appeals and Application for Stay before United States Supreme Court:

Mr. Stephen F. Hefner
Attorney at Law
109 West Houston Street
Sherman, Texas 75090

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

No, Petitioner was convicted and sentenced on a lesser included offense to that charged in the indictment.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

No.

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

Executed at Bonham, Fannin County, Texas, on the *13th* day of May, 1980.

Respectfully submitted,

STEPHEN F. HEFNER &
ASSOCIATES
109 West Houston Street
Sherman, Texas 75090
(214) 892-1515

BY: /s/

Stephen F. Hefner

/s/

Sam McDonald, Petitioner